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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,

Petitioner,

—v.—

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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August 15, 1997

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MOTION OF AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the American Arbitration Association respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the Petition. The consent of the parties to the filing of this brief has been requested. Petitioner has given consent; respondent has refused.

INTEREST OF THE AMERICAN ARBITRATION ASSOCIATION

The American Arbitration Association ("AAA") is a not-for-profit, public service organization which offers a broad range of dispute resolution services through its 38 offices located in major cities throughout the United States and worldwide. Millions of workers are currently covered by arbitration provisions contained in collective bargaining agreements ("CBAs") administered by AAA. In addition to providing the labor management community with case administration services, AAA conducts educational programs; maintains rosters of neutrals; maintains administrative procedures, rules and guides; publishes labor arbitration awards; provides membership services; and maintains a comprehensive library and research facilities. AAA is dedicated to the speedy resolution of labor and other disputes through arbitration, mediation, fact-finding, and other conflict resolution techniques. For seventy years, AAA has set the standard for the development of fair and equitable dispute resolution procedures.

AAA is regularly engaged in administration of arbitration proceedings pursuant to CBAs of the type at issue in the union's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"). Thus, AAA is uniquely qualified to elaborate on the concern set forth in the Petition that to allow the Fifth Circuit decision to stand is "to destroy arbitration's utility as a final and binding method of resolving contractual disputes." Petition at 8. AAA's analysis of the legal and practical significance and consequence of the Fifth Circuit's decision below provides an important perspective which will assist the Court in its consideration of the Petition;

therefore, AAA respectfully moves for leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

/s/ Michael F. Hoellering

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BRIEF AMICUS CURIAE OF AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amicus curiae,* the American Arbitration Association. The consent of the parties to the filing of this brief has been requested. Petitioner has given consent; respondent refused.

INTEREST OF AMICUS CURIAE

The American Arbitration Association ("AAA") is a not-for-profit, public service organization which offers a broad range of dispute resolution services through its 38 offices located in major cities throughout the United States and worldwide. Millions of workers are currently covered by arbitration provisions contained in collective bargaining agreements ("CBAs") administered by AAA. In addition to providing the labor management community with case administration services, AAA conducts educational programs; maintains rosters of neutrals; maintains administrative procedures, rules and guides; publishes labor arbitration awards; provides membership services; and maintains a comprehensive library and research facilities. AAA was also instrumental in promulgating a Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, and cooperates with the National Academy of Arbitrators in seeking to control and limit wasteful and unproductive arbitration-related litigation. For seventy years, AAA has been dedicated to the resolution of disputes through arbitration, mediation and other alternative dispute resolution techniques.

Because AAA is regularly engaged in administering labor-management arbitration agreements -- a process that is being seriously undermined as a result of the decision below -- AAA has a substantial interest in the Court's resolution of the important questions of arbitration policy presented by the Petition.

SUMMARY OF ARGUMENT

This case is significant in that it presents squarely the question of when an arbitrator's award draws its "essence" from

a collective bargaining agreement. More than 30 years ago, this Court determined that arbitrators' awards are entitled to a deferential standard of review. An arbitrator's ruling must be confirmed if it in fact draws its "essence" from the collective bargaining agreement. Despite this standard and this Court's well-established support of arbitration, certain lower courts -- including the Fifth Circuit in the proceeding below -- have overstepped the bounds of the Court's mandate of limited review and have improperly reevaluated the *merits* of underlying disputes. This case affords a desirable and necessary occasion for the Supreme Court to reconfirm and clarify the "essence" test before the arbitral system in the United States becomes a casualty of second-guessing courts.

Here, the Fifth Circuit has interposed its own view of morality on the collective bargaining agreement in evaluating and ultimately reversing the arbitrator's decision. This interference with the arbitration process runs contrary to this Court's rulings -- as well as similar holdings of the Fifth Circuit itself.

Unless the Petition is granted, the Fifth Circuit's vastly expanded standard of review of arbitrators' decisions will impact negatively the practice and procedure of labor arbitration and will, if not corrected, affect adversely the ability of employers, employees, and unions to efficiently and effectively resolve workplace disputes. Simply put, the Fifth Circuit's decision will encourage and may result in a flood of court litigation to review arbitrators' awards.

Accordingly, the Court should take this opportunity not only to reverse the decision of the Fifth Circuit in this case, but also to reaffirm and further clarify the standards to which all lower courts must adhere in reviewing labor arbitration awards.

ARGUMENT

I. THE GROWTH OF IMPORTANCE OF ARBITRATION IN THE AMERICAN LEGAL SYSTEM

The American system of "justice for all" offers a commitment to just, speedy, and inexpensive resolution of civil disputes in the courts. However, as noted by Senator Orrin G. Hatch in his report to the Senate on the Civil Justice Reform Act of 1990, "[h]igh costs, long delays and insufficient resources all too often leave this time-honored promise unfulfilled." S. Rep. No. 416, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6804, 6804.

As a result, an extraordinary interest has developed over the past several decades in resolving disputes outside of the court system. The process of arbitration, in particular, has gained widespread acceptance as a useful and efficient tool for dispute resolution -- both pursuant to collective bargaining agreements and otherwise. In a recent study of 1,000 of the largest U.S. corporations, 79 percent reported using arbitration within the past three years. David B. Lipsky & Ronald L. Seeber, The Use of ADR in U.S. Corporations: Executive Summary, (A Joint Initiative of Cornell University, The Foundation for the Prevention and Early Resolution of Conflict, and Price Waterhouse LLP) (1997). In the labor-management context, virtually all collective bargaining agreements provide for arbitration of unresolved grievances. Last year, more than 15,600 labor disputes were filed for arbitration with AAA alone.

This Court has encouraged the use of private dispute resolution and, in another context, has supported the reversal of

the "anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 n. 14 (1985) (citations omitted); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-221 and n.6 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 and n.4 (1974). It is plain that arbitration offers significant advantages in the resolution of disputes.

Arbitration offers an agreed-upon process of dispute resolution. Arbitration in the labor-management context is generally the result of a negotiated, contractual exchange. The parties have agreed to include the process in the CBA, and, often, have chosen an arbitration administrator, such as AAA, or even a particular arbitrator or panel of arbitrators, in advance of a dispute.

Arbitration under a CBA serves several advantageous purposes. First, it creates a private system of industrial justice, tailored to fit the needs of the particular parties to the CBA. In United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960), this Court recognized that "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." In addition, the very process of arbitrating disputes often acts to explicate the terms of the CBA. See id.

Finally, inclusion of an arbitration policy in a CBA is a mechanism for industrial peace -- often the arbitration agreement is the negotiated *quid pro quo* for an agreement not to strike. The opportunity to present grievances to a neutral party who will

render a binding decision serves to prevent workers from engaging in self-help in response to a disagreement with management. As the Fifth Circuit has recognized, "respect for the finality of arbitration awards furthers the public policy of encouraging management and labor to settle their disputes through arbitration rather than through strikes and violence." Manville Forest Prods. Corp. v. United Paperworkers Int'l Union, 831 F.2d 72, 74 (5th Cir. 1987) (citing Warrior & Gulf Navigation Co., 363 U.S. at 578).

Arbitration offers an expert decisionmaker. This Court itself has acknowledged that an arbitrator, rather than a judge, is the preferred decisionmaker to resolve disputes under CBAs:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed by[sic] foreign to the competence of courts.
> * * * The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further the common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.

Warrior and Gulf Navigation Co., 363 U.S. at 581-82. As acknowledged by the Court, the decisionmaker in arbitration is an industrial expert. He is usually well-versed in employment

disputes and in interpreting CBAs. Parties select an arbitrator based at least in part on their "confidence in his knowledge of the common law of the shop." Id. at 582. An arbitrator also is often chosen because he is familiar with the particular plant or the particular CBA at issue. Cf. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). ("[Arbitrators] sit to settle disputes at the plant level -- disputes that require for their solution knowledge of the custom and practice of a particular factory or of a particular industry as reflected in particular agreements."); Mitsubishi Motors Corp., 473 U.S. at 633 ("[A]daptability and access to expertise are hallmarks of arbitration.").

Arbitration offers an expeditious, final resolution. Like litigation, arbitration offers an impartial, final and binding decision rendered by a third party; among the significant advantages of arbitration is that it allows parties to avoid the time and expense of formal court proceedings. As recognized by this Court, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." Mitsubishi Motors Corp, 473 U.S. at 633.

More than 30 years ago, in recognition of the benefits of labor arbitration, this Court declared that agreements to arbitrate are entitled to great deference. In the seminal cases of United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960), and Warrior and Gulf Navigation Co., 363 U.S. 574, this Court recognized and supported the trend of submitting labor cases to arbitration by establishing that the role of a court is strictly limited once parties have agreed to arbitrate. When asked to evaluate whether a particular dispute must be arbitrated, a court

is confined to determining whether the dispute at issue is governed by the agreement to arbitrate: "Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." Am. Mfg. Co., 363 U.S. at 567-78.

Once an award has been rendered, courts are similarly limited in the scope of their review of the arbitrator's decision. The question of the proper interpretation of the contract as applied to a particular dispute is again "a question for the arbitrator." Enterprise Wheel & Car Corp., 363 U.S. at 598. Unless the arbitrator's decision fails to "dra[w] its essence from the collective bargaining agreement," a court must enforce the award and may not review the merits of the dispute. Id. at 597. In 1976, the Fifth Circuit itself acknowledged this limited role in reviewing arbitration decisions, stating that "when the question of arbitrability is resolved in favor of arbitration, our only remaining function is to determine whether the award draws its 'essence' from the collective bargaining agreement; we do not review the merits or the factual and legal accuracy of the arbiter's findings." Int'l Ass'n of Machinists and Aerospace Workers, District 776 v. Texas Steel Co., 538 F.2d 1116, 1120-21 (5th Cir. 1976) (citation omitted). Further, the court held that "[t]he 'essence' standard is to be interpreted expansively so as to uphold the award, rather than restrictively." Id. at 1121.

Under the essence standard, even if a party alleges that an award is based on errors of fact or misinterpretation of the contract, a court is not permitted to consider the merits. See United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 36 (1987). Even if the court itself believes that the arbitrator has made the wrong decision, it may not apply its "own brand of industrial justice." Id. at 38 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed

serious error does not suffice to overturn the decision."); accord Dixie Machine Welding & Metal Works, Inc. v. Int'l Brotherhood of Boilermakers, 867 F.2d 250 (5th Cir. 1989). Accordingly, a court may not overturn an arbitrator's decision "simply because the court believes its own interpretation of the contract would be a better one." W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of Am., 461 U.S. 757, 764 (1983) (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596). In Enterprise Wheel & Car Corp., the Court reversed the Fourth Circuit where "[t]he Court of Appeals' opinion . . . was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it." 363 U.S. at 598.

II. THE FIFTH CIRCUIT'S DECISION CREATES A NEW STANDARD OF JUDICIAL REVIEW OF ARBITRAL DECISIONS AND CONFLICTS WITH ESTABLISHED PRECEDENT

Despite the intent of the Steelworkers' Trilogy, some Circuit Courts have grossly misapplied the essence test. Given the Court's well-established standards of arbitral review, it should be obvious that courts are not permitted to evaluate the merits of an arbitrator's award. However, that is exactly what the Fifth Circuit did in Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713, 103 F.3d 449 (1997), the decision below. The Fifth Circuit rejected the arbitrator's award based on its own construction of the contract, substituting its view of a phrase in the collective bargaining agreement, "immoral conduct," for that of the arbitrator. The majority concluded that the employee's action -- giving a false reason for her request for a short leave from work

in order to pay her electric bill and have her electricity turned back on -- was "immoral conduct" requiring dismissal.

In contrast, the arbitrator had interpreted "immoral conduct" under the agreement as *not* encompassing the act at issue. The arbitrator was faced with an employee's lie concerning the reason for requested time off. There was nothing in the contract requiring the arbitrator to find that this particular behavior constituted immoral conduct or required immediate discharge. The arbitrator did what he was selected to do: utilize his judgment to interpret the contract in light of existing circumstances.

This Court's holdings in United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) and United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 36 (1987) make clear what Judge Benavides echoed in his strong and cogent dissent: It was solely up to the arbitrator to determine whether the conduct engaged in by the discharged employee amounted to immoral conduct under the CBA. See Bruce Hardwood Floors, 103 F.3d at 454 (citing Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F. 2d 940 (1st Cir. 1988)). In Georgia-Pacific Corp., where the contract term at issue was "dishonesty," the First Circuit stated:

> Although the collective bargaining agreement in this case authorizes immediate discharge for dishonesty, it does not define that term. It is thus up to an arbitrator to decide whether a given pattern of conduct amounts to dishonesty. For example, an arbitrator may decide that stealing a company pencil does not amount to dishonesty for purposes of immediate discharge.

864 F.2d at 945 n. 2.

Simply put, the arbitrator here found it unreasonable to interpret "immoral conduct" *as expressed in the CBA* as including giving a false reason, when pressed, for requesting a 45-minute absence from work. Despite the Fifth Circuit's determination that lying is "[b]y definition" immoral, Bruce Hardwood Floors, 103 F.3d at 452 n.4, immoral conduct was *not* so defined in the CBA. It defies logic to assume that the company or the union had the Sixth Edition of Black's Law Dictionary in mind when drafting the grounds for discipline. Further, as noted by George Nicolau, President of the National Academy of Arbitrators, "[t]he fact that the 6th Edition didn't mention lying didn't faze the majority at all." Whatever Happened to Arbitral Finality? Is It Their Fault Or Ours?, LABOR LAW JOURNAL, May 1997 at 264.

The Bruce Hardwood Floors decision is not an isolated case;[1] there are, unfortunately, similar such circuit court cases,

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[1] Similarly, it is not unusual for an arbitrator to be required to determine whether an employee has engaged in "immoral conduct"; thus, there is no reason for a court to take such an issue out of the hands of an arbitrator. See, e.g., Georgia-Pacific Corp. v. Int'l Woodworkers of Am., 104 Lab. Arb. (BNA) 1213 (1995) (Allen, Arb.) (determining that stealing and lying by punching another employee's time card constitutes "immoral conduct"); California Sch. Employees Ass'n v. Stockton Unified Sch. Dist., 1995 WL 594536 (1995) (Concepcion, Arb.) (finding that the grievant had engaged in "immoral or unprofessional conduct" by lying and intentionally deceiving his employer regarding his reasons for requested time off); James River Corp. v. United Paperworkers Int'l Union, 1994 WL 853688 (1994) (House, Arb.) (holding that the grievant was not guilty of "immoral or improper conduct" where he had engaged in a fight with a co-worker).

with the Fifth Circuit's opinion here as a stark illustration, reflecting a more probing (and inappropriate) review than that sanctioned by this Court. While it is consistent with this Court's precedent to overturn arbitral action that violates the parties' contractual mandates, some courts have gone too far -- to the point of evaluating the merits of the dispute and using their own interpretation of the contract language to determine whether the action is contrary to "express" provisions. See e.g., Browning-Ferris Industries of Tennessee, Inc. v. Teamsters Local Union No. 984, No. 90-5933, 1991 U.S. App. LEXIS 24760 (6th Cir. Oct. 10, 1991); Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n, 889 F.2d 599, 604 (5th Cir. 1989), rehearing denied, 897 F.2d 746, cert. denied. 498 U.S. 853 (1990); S.D. Warren Co. v. United Paperworkers' Int'l Union, 846 F.2d 827 (1st Cir. 1988).

Like the Fifth Circuit below, the Sixth Circuit in Browning-Ferris Indus., 1991 U.S. App. LEXIS 24760, substituted its own interpretation of a contract term for the arbitrator's in order to overturn an award. The terms of the CBA allowed discharge in case of "theft." Id. at *3. Based at least in part on "the intent of the parties to the collective agreement," the arbitrator determined that the employee's behavior was not "theft" as defined under the CBA. Id. at *7. The Sixth Circuit determined that "the arbitrator's decision ignores the *plain meaning* of the word 'theft' in the contract, and hence can not be enforced." Id. at *23 (emphasis added). The court ruled that the "plain meaning" of the word theft, as defined in Webster's Third New International Dictionary, should prevail over the arbitrator's interpretation. While acknowledging that the controlling standard required enforcement of "any plausible construction of [the CBA] term by the arbitrator, even one wholly at odds with what would be considered the 'plain meaning' of the term," id. at *10, the Sixth Circuit ignored this

bedrock legal principle by replacing the arbitrator's interpretation of the contract with Webster's Dictionary and the court's own construction of the CBA term.

In Delta Queen Steamboat Co., 889 F.2d 599, the arbitrator had found that while the employee had engaged in dismissable misconduct as defined under the contract, he was the victim of disparate treatment and, thus, should not be discharged. Despite its awareness of the limited standard of review, 889 F.2d at 602, the Fifth Circuit reviewed the contract and interpreted a clause in the CBA allocating to management the power to discipline and discharge to find that there was just cause. This finding was impermissible under the "essence" test; the determination of whether there was just cause for discharge was solely for the arbitrator. As stated by the dissent to the denial of the rehearing en banc, this opinion "constitutes a significant and regrettable departure from the well-established law of this Circuit, and of the entire country, on deference to labor arbitration awards." 897 F.2d at 742 ("I can only conclude that an intense disagreement with the arbitrator's reinstatement decision by the panel has led it to decide that the arbitrator departed from the contract in reaching that decision.").

The First Circuit, in S.D. Warren Co., 846 F.2d at 827, similarly departed from this Court's standard of review. The First Circuit violated the mandate of Enterprise Wheel & Car Corp., 363 U.S. at 598, by applying its own understanding of the contract to determine that the arbitrator had abused his authority in finding that the discharge of the employees was not within the discretion of the employer. 846 F.2d 827, 828. Although the arbitrator found that the applicable contract language was ambiguous and interpreted it in favor of the employees, the court disagreed, based on its own understanding of the provisions's clear meaning under the "English language." Id.

As this Court concluded in United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 569 (1960), "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." This Court intended that this function remain with the arbitrator, even if a court believes the decision is "wrong."

As discussed above, although the Court established the appropriate standard of judicial review of labor arbitration awards over 30 years ago, such standard is not being applied consistently or appropriately by the circuit courts. Judges in both the Sixth and Seventh Circuits have commented on the difficulty of applying the essence standard. See Lattimer-Stevens Co. v. United Steelworkers of Am., 913 F.2d 1166, 1170 (6th Cir. 1990) (Boggs, J., dissenting), reh'g en banc denied, 1990 U.S. App. LEXIS 22057 (6th Cir. Dec. 4, 1990); Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1506 (7th Cir. 1991). It is unclear whether the disregard of this Court's mandate of limited review of arbitrators' decisions is intentional, or due to some misunderstanding of the "essence" of the contract standard. In either case, it should not be tolerated. To the extent that the settled law is unclear to the courts, it is time for the Court to reinforce the limits of a court's reviewing authority of a labor arbitration decision.

III. THE FIFTH CIRCUIT'S DECISION UNDERMINES ARBITRATION AGREEMENTS AND ERODES THE BENEFITS OF ARBITRATION.

Although courts (including the Fifth Circuit) continue to enforce agreements to arbitrate, decisions like Bruce Hardwood

Floors adversely affect the entire arbitration process. For, if a court is allowed to substitute its own judgment for the judgment of an arbitrator, as the Fifth Circuit did in this case, the recognized benefits of arbitration will be diminished and the process will lose its effectiveness.

The decision undermines the agreed-upon method of dispute resolution. In the case below, the Fifth Circuit substituted its own opinion for exactly what the parties had agreed upon, i.e., the acceptance as final of the arbitrator's judgment. The arbitrator made a decision which was squarely within the four corners of the CBA; that is precisely the justice for which the parties contracted. Reversal of an arbitrator's decision under facts such as these obviates the parties contractual agreement. As stated by this Court in enforcing an arbitration provision in a collective bargaining agreement, "[i]n these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." United Steelworkers of Am. v. Am. Mfg Co., 363 U.S. 564, 568 (1960); see also Saint Mary Home, Inc. v. Service Employees Int'l Union, No. 96-9353, 1997 U.S. App. LEXIS 15015 (2d Cir. May 30, 1997) ("In contracting for arbitration of disputes over whether just cause existed for discharging employees, the parties bargained for a decision by the arbitrator, not necessarily a good one, and that is what they received.") (citation omitted).

The parties have contracted to have disputes settled by the arbitrator, thus "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 37-38 (1987). The Fifth Circuit itself has recognized this: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." Safeway Stores v. Am. Bakery and

Confectionery Workers Int'l Union, Local 111, 390 F.2d 79, 84 (5th Cir. 1968); accord Dixie Machine Welding & Metal Works, Inc. v. Int'l Brotherhood of Boilermakers, 867 F.2d 250, 253 (5th Cir. 1989) ("Federal law gives very great deference to private ordering in arbitration cases. The parties have contracted to be bound, and bound they stay."); Manville Forest Prods. Corp. v. United Paperworkers Int'l Union, 831 F.2d 72, 74 (5th Cir. 1987) ("The parties bargained for an arbitrator who would determine facts and interpret the contract; there is no injustice in holding them to this bargain.") (citation omitted) .

Finally, allowing this decision to stand might discourage parties from including arbitration provisions in collective bargaining agreements -- if a large number of disputes eventually end up in court, there is less incentive to agree to arbitration. Such a development would undermine the basic fabric of labor-management relations and accepted methods of achieving industrial peace. As this Court recognized, "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 n. 4 (1960) (citation omitted). The Fifth Circuit itself recognized that if it were permissible for a court to review an arbitrator's construction of the contract, "arbitration as a structure for industrial peace supplanting the usual processes of court adjudication would itself be supplanted by the judicial machine at the time it would count the most -- that is, at the moment an arbiter's award was sought to be enforced." Safeway Stores, 390 F.2d at 82.

The decision undermines arbitration's benefit of an expert decisionmaker. If this decision is allowed to stand, arbitration increasingly will no longer offer parties the traditional advantage of a decision by an agreed-upon expert. It will be the decision of

an agreed-upon expert, *but only if* the judge agrees. This would not only be contrary to the parties' agreement, but would lead to undesirable results. As recognized by this Court, "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." Warrior & Gulf Navigation Co., 363 U.S. at 582.

The decision undermines arbitration's benefit of a speedy, final resolution. Arbitration will no longer be a faster and cheaper alternative to litigation; it will become simply a precursor to litigation. If courts are permitted to review an arbitration decision *de novo* under the guise of reviewing the essence of the contract, then *all* losing parties will have an incentive to appeal. As noted by one commentator, "court decisions vacating arbitration awards beget more lawsuits seeking to set aside awards -- and so on." George H. Cohen, Erosion of the Arbitration Process by the Courts: Can the Award and Opinion be Immunized?, in ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 154-55 (Gladys W. Gruenberg ed, 1992). As a result, arbitration will no longer offer a final and binding determination: "[P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599.

By reevaluating arbitration awards on the merits, courts are "sending a signal to companies [and employees] who lose labor arbitrations which says 'Come to us! If we think the interpretation of your contract is wrong even though the provision is ambiguous, we will find for you that the arbitrator

exceeded his jurisdiction and set his award aside.'" Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n, 897 F.2d 746, 750 (Williams, J., dissenting to denial of rehearing en banc). Any party unhappy with an arbitrator's decision will go to court to try to find judges, like the panel here, who will impose their own particular brand of industrial justice. Not only will the losing party be afforded "two bites at the apple," but the path to a final and binding resolution will be needlessly prolonged -- parties will be forced to undergo one procedure in the arbitration and then repeat the process in the courtroom.

The refusal of courts to review the merits of an arbitration award is the appropriate and well-established approach. To allow any court to overturn an arbitrator's decision based on a conception of morality gleaned from the pages of Black's Law Dictionary would undermine the established system of review and negatively impact the practice of arbitration. Nor is this an isolated case; in the district and circuit courts, the issue of whether an arbitrator has exceeded his authority is a "recurring question." Houston Lighting & Power Co. v. Int'l Brotherhood of Elec. Workers, Local Union No. 66, 71 F.3d 179, 180 (5th Cir. 1995), cert. denied, 117 S.Ct. 52 (1996). It is this case, however, that provides the court with an ideal opportunity to reaffirm and clarify the proper standard of review of a labor arbitration award.

CONCLUSION

WHEREFORE, AAA respectfully urges the Court to grant the Petition and vacate the decision of the court below.

Respectfully submitted,

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